Supreme Court, U.S.
FILED
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No. 02 670

IN THE

SUPREME COURT OF THE UNITED STATES

RALSTON HAUGHTON and MARGARET HAUGHTON
husband and wife, Petitioners

vs.

WAL-MART STORES INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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49pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Title 42 U.S.C. § 1983, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, affords the Respondent Wal-Mart Stores Inc., the right to be directed, to be advised, and to be authorized by the states attorney's office to write the race of the Petitioner on the Petitioners' check when purchasing merchandise at the Respondent's store, and Respondent Wal-Mart Stores Inc., not be rendered a state actor "under color of state law".

2. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, affords Respondent Wal-Mart Store Inc., the right to write the race of the Petitioner on the Petitioners' check when purchasing merchandise at Wal-Mart Store Inc., store, without a valid compelling state interest.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1. ASDA Group Limited
2. Richard A. Durose
3. Scott A. Forman, Esquire
4. Hon. Thomas B. McCoun, 111, U.S. Magistrate Judge
5. Margaret Haughton
6. Ralston Haughton
7. McLane Company, Inc., and its subsidiaries
8. Hon. Steven D. Merryday, U.S. District Judge
9. Sam's East,, Inc.
10. Sam's Property Company
11. Sam's West, Inc.
12. Sam's Real Estate Business Trust
13. Michael C. Scher, Esquire
14. Wal-Mart Property Company
15. Wal-Mart de Mexico, S.A. de C.V.
16. Wal-Mart Real Estate Business Trust
17. Wal-Mart Stores East, Inc. Page
18. Wal-Mart. Com, Inc.
19. Wares Delaware Corporation
20. Erin A. Webb

TABLE OF CONTENTS

Page

Question Presented for Review.....-i-
List of Parties to the Proceedings in this Court.....-ii-
Table of Authorities.....-iv-
Opinion Below.....-vi-
Statement of Jurisdiction.....-vii-
Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved.....-viii-
Statement of Case.....1
Reason for Granting Writ.....7
Conclusion.....24
Appendix.....25
A. Judgment of Court of Appeals.....25
B. Opinion Below.....26
C. Orders on Rehearing.....31
D. District Court Order.....33
E. Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved.....37
F. Miscellaneous.....39

TABLE OF AUTHORITIES
CASES

Page

Anderson v. Martin, 375 U.S. 399, 84 S. Ct. 454, 11 L.Ed. 2d 430 (1964).....15,16,19
Ammons v. Dade City 783, F. 2d at 987-88.....21
Baldwin v. Morgan, 287 F.2d at 750-760, (5th Cir. 1961).....10
*Booker v. City of Atlanta, 776 F. 2d 272 (11th Cir. 1985).....*9
Burton v. Wilmington Parking Authority, 81 S. Ct. 856 (1961).....13
City of Mobile, Ala v. Bolden, 446 at 120-21, 100 S.Ct. 1440 at 1517 (1980).....21
Columbus Board of Education v. Penick, 443, U.S. 449, 464-65, 99 S. Ct. 2941, 2950, 61 L.Ed. 2d. 666 (1979).....21
*Dowdell v. City of Apopka, 698 F. 2d 1181 (11th. Cir. 1983).....*21
Duke v. Smith, 13 F. 3d 388, (11th Cir. 1994).....8
Edmonson v. Leesville Concrete Co., (1991) 500 U.S. 614, 114 L.Ed. 2d 660, 674, 111 S. Ct. 2077.....9
Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d. 110 (1960).....20
Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed 2d 158(1971).....17,19
Hunter v. Erickson, 1969, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616.....19
*Lombard v. Louisiana 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963).....*7
Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982).....9
Peterson v. City of Greenville 83. S. Ct. 1119(1963).....12
Roberts v. Wal-Mart Stores Inc., 769 F. Supp. 1086 (E.D. Mo. 1991).....22
Robinson v. Florida, 378 U.S. 153, 84 S.Ct. 1119, 10

L.Ed. 2d 323-22.....13
Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d. 830 (1967).....8
Roger v. Lodge at 102 S. Ct. 3272, at 3280 (1982).....22
Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, at 596, (1th Cir. 1970).....8
Tulsa Professional Collection Services v Pope, 485 U.S. 478, 108 s. Ct. 1340, 99 L. Ed. 2d 565 (1988).....10
United States v. Texas Education Agency, 564 F.2d 162, 168 (5th Cir 1977) cert. Den., 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed. 2d 879 (1979).....21
Village of Arlington Heights v. Metropolitan Housing Dev., Corp., 429 U.S. at 265-66, 97 S. Ct. at 563.....22
Wallace v. Debron Corp., 494 F. 2d. 674 (8th Cir. filed Mar. 28, 1974).....20
Williams v. Matthews Company 499 F. 2d 819, 826 (1974).....20

STATUTES

42 U.S.C. § 1983.....-viii-,1,5,7,15
28 U.S.C. §1254(1).....-vii-
Florida Statute § 832.....8

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution.....-viii-,1,2,17,21,24
Equal Protection Clause of the Fourteenth Amendment.....-viii-1,5,15,18,22,23

TREATIES

CONSTITUTIONAL LAW, page 486, (Fifth Edition) by John E. Nowak, Ronald D. Rotunda.....12,13

OPINIONS BELOW

The July 19, 2002, opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at case number 02-10385-EE, date of the decision is September 24, 2002, the decision is unpublished, and is reprinted in the Appendix to this Petition, at page 26. The prior opinion of the United States District Court for the Middle District of Florida, entered December 31, 2001, is reported at case number 01-01131 CV-T-23, the decision is unpublished, and is reprinted in the Appendix to this Petition at page 32.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 2002, and the Petition for Rehearing was timely filed and was denied on September 24, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any States deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Title 42 U.S.C. Section 1983, which provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws; shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Colombia shall be considered to be a statute of the District of Columbia.

TREATIES

CONSTITUTIONAL LAW, page 486, (Fifth Edition) by John E. Nowak, Ronald D. Rotunda.

STATEMENT OF THE CASE

This is a racial discrimination action brought by Ralston Haughton and Margaret Haughton, husband and wife, the Petitioners on May 18, 2001, pursuant to 42 U.S.C. § 1983, for civil rights violations committed by Respondent, "under color of state law," which deprived the Petitioners of rights secured under the Fourteenth Amendment of the United States Constitution equal protection, rights, privileged and immunities clauses.

The Petitioners are African American citizens and are proceeding in pro se without the assistance of counsel, in claims of racial discrimination and racial segregation, with humiliation, emotional distress and having been made to feel inferior.

The Petitioners' principal claim, pursuant to 42 U.S.C. § 1983 (R1-98), alleges that Respondent writing "B/F" on the check, constitutes "racial discrimination and racial segregation" in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, for which violation the Petitioners seek $100,000,000 in compensation damages and $100,000,000 in punitive damages because, the Petitioners' Constitutional right to be free from racial discrimination which is guaranteed, secured, and protected by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, is "very important," and because "many have died to give us this freedom." The Petitioners' amended complaint (R1-98) contains three counts. Count one alleges racial discrimination in violation of the Fourteenth Amendment and 42 U.S.C. §1983. Counts two and three allege claims for emotional distress and loss of consortium, of which the Petitioners seek $100,000,000 in compensation damages and $100,000,000

in punitive damages for the injuries Petitioners suffered from the racial discriminatory actions of Respondent, claims are wholly dependent on and derivative of the racial discrimination claim alleged in count one.

While the litigation followed the Petitioners Constitutional rights, the complaint sought the complete freedom from racial discrimination of the writing of race on checks system and provision of equal protection to all citizens of this nation.

The Respondent established a check writing policy that was permitted and enforced by the state attorney's office in Sarasota County, Florida, that requires that the Petitioners' race must be written on their check when they purchase a merchandise at Respondent's store. This alleged policy was intentionally designed to operate and was implemented to racially discriminate against blacks.

There is substantial evidence in the record as shown by, the Petitioners check with B/F written by Respondent; affidavit of Nancy Silvia, a white female whom sworn that she shopped at Respondent's store and there was no race written on her checks; Petitioner Margaret Haughton's deposition testimony showing that she told other white people that Respondent wrote the race on her check, and that they immediately said that, Respondent did not write their race on their checks; the historical document, and depositions on record with the Respondent's employees' testimonies about the alleged policy and its history; and the omission of evidence and argument showing any demonstration of any successful relationship as to combating Respondent's fraudulent check customers.

The Evidence

The pattern of the Respondent racially discriminatory conduct of the alleged policy had persisted from about 1991, or a considerable time in the United States and

Sarasota County, Florida. Much of the evidence in the record demonstrated Respondent's use of the state attorney's office statement, which directed, and advised Respondent that the state attorney's office would prosecute the customers fraudulent checks if the Respondent wrote the race on the customers checks.

Prior to the alleged policy, Respondent stores followed the normal procedure as other stores in accepting customer checks with identification, such as drivers licenses, telephone numbers and possible other points, but race was never used, yet the Respondent chosen to bear up on the Petitioner's race for identification. Furthermore, the area of the Respondent store is predominantly white

On February 15, 2001, the Petitioners, Ralston Haughton and Margaret Haughton, who are African American, purchased an ink cartridge at the Respondent store Wal-Mart in Sarasota, Florida. Petitioners paid for the cartridge with a check, which Respondent accepted. To verify Petitioner's identity, Petitioner presented her Florida drivers license. Respondent wrote the Petitioner's Margaret Haughton drivers license number and date of birth on the top of the check. Respondent also wrote "B/F" on the top of the check (R1- 98, copy of check attached). When the Petitioner asked the Respondent about the B/F written on their check , the Respondent responded that "B/F" means "black, female causing emotional distress, humiliation, embarrassment and other related mental anguish upon the Petitioners.

The Respondent stated that, the state attorney's office made the statement, directing, and advising Respondent to write the race on the customers checks, so that the state attorney's office could prosecute the fraudulent check customers, and that they were following that guideline (R1-81-47-line 14-17). The

Respondent also admitted that, without the state attorney's office statement directing and advising Respondent, they would not have written the race of the Petitioner on the Petitioners' check (R1-83, 27, line 11- Pg. 29,-line 9).

There is no reasonable distinction that can be found for the purpose of writing B/F on Petitioners' check other than for intentional racial discrimination and segregation purpose. The record has shown that it is not the Respondent's policy to write W/F meaning white female on white females checks because, Nancy Silvia, a white female sworn and signed an affidavit (R1-84. *Affidavit attached.*), that she wrote checks at Respondent's store Wal-Mart, and there was no "W/F' written on her checks, also, Margaret Haughton the Petitioner's deposition in the record shows that, the Petitioner investigated Respondent's check policy among white people, and told the white people that Respondent writes race on checks, of which these white people immediately told Petitioner that Respondent did not write race on their checks. (R1-61-32-line 2-15.) The record shows Carolyn Shelton (R1-81,-60, line 1-21) deposition testimony, and the *Roberts v. Wal-Mart Stores Inc.*, 769 F. Supp. 1086 (E.D. Mo. 1991) case that, Respondent has an history of committing the alleged conduct, and had foreseen that the alleged policy would hurt black customers. The record has shown that the alleged policy was not necessary (See deposition testimony of David Dickerson which stated that, " *It doesn't make any difference if race is written on the checks if it is legitimate,*"(R1-83-123, lines 20-Pg. 124- lines 10), also Carolyn Shelton deposition testimony which stated that:

" *Q. Does it make your job any easier because you see the different races on the check?*

A. It doesn't make it easier. It doesn't make it harder,

because I am not looking at that." (R1-81-61-line 23, Pg. 62- line 1). The record also shows that Respondent did not argue on, nor has shown any demonstration of any successful relationship to combating customers' fraudulent checks. Furthermore, the record shows Respondent executive employees Carolyn Shelton (R1-81-63-lines 1-9), and David Dickerson (R1-83-124, lines 1-10) depositions testimonies shows inconsistencies with the District Court conclusion that the Respondent alleged policy is to combat customers fraudulent checks. (R1-99-3.)

As a result of the actions and racially discriminatory conduct of Respondent as alleged herein, Petitioners have sustained damages, including but not limited to emotional distress, mental anguish, feeling inferior, embarrassment and humiliation.

After the incident completed of above Petitioners communicated to Respondent's home office asking Respondent to cure or correct the discriminatory act of which the Petitioners complained, but Respondent has failed and refused to do so, or to even apologize to the Petitioners.

The Rulings Below

The United States Court of Appeals Eleventh Circuit rejected the Petitioners Title 42 U.S.C. § 1983, claim and affirmed the District Court ruling. (Appx-B-26.) The Court of Appeals did not rule on the Petitioners' racial discrimination claim of violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

The Court of Appeals ruled in their opinion (Appx-B-Pg. 28.) that:

" Finally, although the state attorney's office advised Wal-Mart of the information that it would like to have to prosecute check fraud, it did not compel or provide encouragement significant enough for Wal-Mart

to have become a state actor under the state compulsion test."

The District Court ruled on the racial discrimination issue, that the Petitioners' "failed to present any credible evidence that Wal-Mart discriminated against them, intentionally or otherwise, on the basis of race" (Appx-D-34), and that "no genuine material issue of fact exists with respect to whether Wal-Mart intentionally discriminated against the Haughtons" (Appx-D-34). The District Court further stated that "the evidence shows the opposite--that Wal-Mart employs the check identification policy without regard to race (or any other distinguishing characteristic, suspect or otherwise)." (Appx-D-34) The District Court below concluded that, "Wal-Mart store maintained a policy requiring its cashiers to note identifying information (e.g., drivers license number, date of birth, race, and sex) of each customer presenting a personal check to purchase merchandise, regardless of the customer's race. Wal-Mart implemented the policy in order to combat check fraud," and that Wal-Mart's conduct was not racial discrimination. (Appx-D-34.)

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Resolve Conflicts Of Decisions of This Court And The Lower Courts, and The Special and Important Question Of Federal Law Which Should Be Settle By This Court.

The first issues in this case involves Respondent's policy of writing the race of the Petitioner on the Petitioners' check, by the states attorney's office direction and advice, which includes statements that the state attorney's office would prosecute Respondent's fraudulent customers checks with race written on them, violating Title 42 U.S.C. § 1983, and not be rendered a state actor under color of state law, which involves principles of law, of which settlement by this Court is important to the Petitioners and the public.

The record evidence established that Respondent's policy of writing the race of the Petitioner on the Petitioners' check was a result of compulsion by the state or a symbiotic relationship under the nexus test.

The Petitioners submitted *Lombard v. Louisiana 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963),* which, in clear contradiction to established law, the Court of Appeals chose to ignore. Here the Supreme Court reversed the trespass convictions of sit-in demonstrators because the city officials, prior to the demonstration, had condemned sit-ins and stated that the city was prepared to enforce the law. These statements were taken to be official encouragement of store owners to use the state trespass laws in a discriminatory manner. The Court also held on the basis of the statement alone that the private discrimination denial of service to petitioners was sufficient to make denial state action.

Similar in this case, the record shows Respondent wrote the race of the Petitioner on the Petitioners' check (R1- 98, *copy of check attached*), the state attorney's office made the statement to Respondent that, in order to have the customers fraudulent checks prosecuted (Using Florida Statute 832.) Respondent must write the race on the customers checks. Respondent's head of the accounting department Carolyn Shelton testified that: *"When we went to prosecute on the check, the prosecutor told us we had to have this information in order to prosecute* (R1- 81,- 46 lines 21- Pg. 47- line 7), also, Carolyn Shelton testified that: *"... if we wanted to prosecute checks, we had to follow these guidelines in order to do it. that's what we do* (R1- 81,- 47- lines 14-17). Respondent's store manager David Dickerson testified that, if it was not for the advice of the state attorney's office they would not have written the race of the Petitioner on the Petitioners' check (R1- 83,- 131,- lines 11- Pg 132- line 24). This evidence shows, the statement of the state attorney's office to prosecute Respondent's fraudulent customers checks with race written on them using Florida Statute 832, has provided official encouragement causing racial discrimination, which is encouragement significant enough to make Respondent a "state actor" under the state compulsion test. Also, the Court of Appeals is in conflict with *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, at 596, (2nd Cir. 1970), which stated that: "if the state engages in conduct having the effect of encouraging, tolerating or acquiescing in discrimination, the Fourteenth Amendment may be invoked." also, see *Reitman v. Mulkey,* 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d. 830 (1967).

The Court of Appeals contradicted its own decision in *Duke v. Smith,* 13 F. 3d 388, (11th Cir. 1994), and has drawn incorrect conclusions contrary to the positive

evidence in the record. *Duke v. Smith,* Id, which was cited in their opinion at Appx B- 28 held that:

> "Because the Florida legislature has given the committee power to "declare [during the reconsideration process] who is fit to run, and who by extention is fit to govern," *Duke II at 1404,* we are bound by the new precedent in this Circuit and hold that the procedures out lined in §103. 101 (2) (c) constitute state action."

The record has positively shown a similarity in this case that, the state attorney's office nine point document, and the statement that advised and directed Respondent to write race on customers' checks, gave Respondent the power to declare [*during the customers' check writing process*] whose check to write race on (R1-98, *copy of check attached*), and whose check not to write race on (R1- 84, *Nancy Silvia's testimony that she is white and Respondent did not write her race on her check shopping at Respondent store. Affidavit attached), also* Margaret Haughton's deposition (R1-61-32-line 2-15).

The Court of Appeals also chose to ignore *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982), *Edmonson v. Leesville Concrete Co.,* (1991) 500 U.S. 614, 114 L.Ed. 2d 660, 674, 111 S. Ct. 2077, and *Booker v. City of Atlanta, 776 F. 2d 272 (11th Cir. 1985),* which were all submitted by the Petitioners.

In Booker v. City of Atlanta Id., supra, the Eleventh Circuit Court of Appeals held that, the arrival and presence of police officer with repossessor of Petitioner's property could have given repossession "a cachet of legality" and that this act constitute state action even though the police department's expressed policy was to remain neutral in such cases. Here, in the record, the presence of the state attorney's office

with the judicial system in connection with the prosecutions of fraudulent checks under Florida Statute 832, have the effect of a "cachet of legality," of which has significantly encouraging Respondent into committing the alleged act (R1- 81,- 46 lines 21- Pg. 47- line 7).

The record also shows that, race is the determinant factor throughout this case, and that the state attorney's office used race as a basis for distinction through the medium of Respondent (R1- 81,- 46-lines 21- Pg. 47-line 2), also (R1- 83,- 132,-lines 12-24), of which is clearly forbidden in this Court.

The Court of Appeals has ignored *Baldwin v. Morgan,* 287 F.2d at 750-760, (5th Cir. 1961), which was submitted by the Petitioners. The Fifth Circuit held that:

> "What is forbidden is the state action in which color (i.e., race) is the determinant." Id 754. The Court also stated: "the very act of posting and maintaining separate waiting room facilities when done by the railroad Terminal as commanded by these state orders is action by the state". Id. 755. The Court then went on to say: "As we have pointed out above the State may not use race or color as the basis for distinction. It may not do so by direct action or through the medium of others who are under State compulsion to do so". Id 756.

The Record shows that David Dickerson Respondent's store manager admitted in his deposition that if it was not for the advice of the state attorney's office Respondent would not have committed the alleged act (*R1-83-132,- lines 12-24), also, see (R1-83-133,- line 6-10).*

The Petitioners submitted *Tulsa Professional Collection Services v Pope,* 485 U.S. 478, 108 s. Ct. 1340,

99 L. Ed. 2d 565 (1988), that was ignored by the Court of Appeals. Here this Court did find sufficient involvement of the probate court. It reasoned as follows:

> "The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice.... Finally, copies of the notice and an affidavit of publication must be filed with the court.... It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved."

Similar in this case and the record, the state attorney's office is intimately involved throughout, and without that involvement the writing of the Petitioner's race on the Petitioners' check would never have been activated. Respondent race on check policy becomes operative only after the state attorney's office involvement has been commenced with Respondent, which triggers Respondent to write the race of the Petitioner on the Petitioners' check. Here, Respondent's head of the accounting department Carolyn Shelton's deposition testimony stated that:

"When we went to prosecute on the check, the prosecutor told us we had to have this information in order to prosecute. At that time we started implementing it on all checks. (R1-81-46-lines 21- Pg. 47-line 2.) Carolyn Shelton's deposition testimony also stated that, "... *if we wanted to prosecute checks, we had to follow these*

guidelines in order to do it. that's what we do. (R1-81-47-lines 14-17). It is only after all of these actions have taken place that the writing of race on checks begins.

The state attorney's office has officially recognized its legitimacy, causing Respondent to rely upon them for the prosecution of customers fraudulent checks with race written on the checks. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL LAW, page 486, (Fifth Edition) by John E. Nowak, Ronald D. Rotunda, stated:

> "When state legislation commands a certain activity, or officially recognizes its legitimacy, there is no question but that state action is present whenever someone follows the guidelines of statute. In such a situation the challenged activity must be taken to exist because the state legislature has commanded its occurrence and continuation. For example, if a state legislature commands that restaurants serve food on a racially segregated basis it is clear that the action of restaurant owners who discriminate between their patrons on the basis of race will constitute state action. Also, see Peterson v. City of Greenville 83. S.Ct. 1119(1963)...

Also, Carolyn Shelton testified in her deposition that:

"Q. When the state attorney spoke about authorizing it, you have never said--think that something is not right?

A. My thought was that everybody is going to be very upset when we write this on their check, everyone,

not just black, everyone.

Q. Yes.

A. Yes...." (R1-81-60,-line 6-20.).

Respondent knew at the time the state attorney's office imposed the alleged procedure upon them that it was wrong, and it would have hurt and emotionally distress the customers, the state attorney's office permitted the racial discrimination to occur, officially recognizing its legitimacy, undisputedly showing that the alleged act was done under the state attorney's office authority, of which significantly encouraged Respondent. See *Peterson v. City of Greenville* 83. S.Ct. 1119(1963), also, *Schneider v. Colegio De Abogados De Puerto Rico*, 565 F. Supp. 963 at 973 (1th Cir. 1983).

See also, CONSTITUTIONAL LAW, page 486, (Fifth Edition) by John E. Nowak, Ronald D. Rotunda, that stated:

> " Similarly state legislation may encourage an activity so as to give rise to state action in the activities of private persons. For example, state action will be found in a restaurant's racially restrictive practices where state legislation requires that restaurants serving members of minority races have separate toilet facilities for those persons. (See *Robinson v. Florida, 378 U.S.* 153, 84 S.Ct. 1119, 10 L.Ed. 2d 323-22.) The restaurant owner who refuses to serve members of a minority is restricted by constitutional provision because that decision must be held to be the result of the state legislation. To hold otherwise would allow the state to have helped establish or continue a practice without any effective remedy."

The *Burton v. Wilmington Parking Authority*, 81 S. Ct. 856 (1961), makes it appropriate to focus not on the substantively acceptable governmental decision to

lease to a private party, but to focus on the choice of the private party to commit racial discrimination. Here in this case, the District Court and the Court of Appeals should have focus not on the state attorney's office advice to the Respondent to commit racial discrimination, but to focus on the racial discrimination choice Respondent has exercised, and on the substantively unacceptable way in which those choices are exercised in this specific case. Burton Id., shifts from the level of rule that tells the lessee, " serve whomever you wish, "to the level of the rule adopted by the lessee himself, "whites only." In this case the state attorney's office, tells Respondent "write race on customers' checks" if Respondent wishes to receive benefits of prosecution, Respondent choose to adopt a policy to write race on "blacks checks only." For this the state attorney's office is responsible. The state attorney's office enables Respondent to engaged in racial discriminatory conduct upon the Petitioners. The alleged policy becomes a policy to discriminate, and without the alleged policy Respondent could never have discriminated with the check of the Petitioners. (R1- 98, *copy of check attached*), (R1-84, Nancy Silvia's affidavit supra), (R1-61-32-line 2-15), (*R1-83, Pg. 132,-lines 12-24*). (R1-83, Pg. 123-lines 16-Pg. 124-line 13.), also, (R1-83-27,-lines 11- Pg. 28-line 21.), also, (R1-83-39,-lines 23-Pg. 40, line 1-3), also see *Seidenberg* 598, supra. To rule that the states attorney's office statement, advice and direction to Respondent to write the race of the Petitioner on the Petitioners check does not constitute state action against the background of racial discrimination, will only help to establish, or continue racial discriminatory practice.

The United States Court of Appeals Eleventh Circuit has limited the remedy, by applying to this case conflicting rulings which has passed upon similar

matters thus, this case is affected by those conflicts, which should be resolved by this Court in order to establish a uniform approach to 42 U.S.C. § 1983 state action cases.

I.

Other Special and Important Question Of Federal Law Which Should Be Settle By This Court.

The Petitioners brought this second issue to this Court for the Court to review because, this case is of imperative importance to the Petitioners' Constitutional rights, and also is such imperative public importance, and requires immediate settlement in this Court.

This issues involves whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, affords Respondent the right to write the race of the Petitioner on the Petitioners' check as a distinction of Petitioner's race when purchasing merchandise at Respondent's store, without a valid compelling state interest.

The Petitioners case should be governed by the "strict scrutiny test" or the same rules as *Anderson v. Martin*, 375 U.S. 399, 84 S. Ct. 454, 11 L.Ed. 2d 430 (1964). regardless of the source of the document because, it is a selected type document which the Respondent uses for benefits or burden. This Court have determined that writing of race on the nomination papers and ballots violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. By comparison, this case raises the question whether the writing of the Petitioner's race on the Petitioners check without a valid compelling state interest constitutes racial discrimination violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The District Court concluded that " no genuine material issue of fact exists with respect to whether Respondent intentionally discriminated against the Haughtons."(R1-99-4.) However, there are many decisions of the United States Supreme Court, including *Anderson, supra,* that recognized that writing race on documents involves conducts that can be subjected to controls that would not be constitutionally permissible in the case of equal protection under the law.

The District Court should have considered the character and magnitude of the violation to Petitioners' Fourteenth Amendment rights, which shows that, although the Petitioner's name and the Florida drivers license were written on the check, Respondent essentially rendered the Petitioners name and drivers license nugatory by providing a racial cue to anyone that chose to offer some kind of benefit, selection for prosecution, or burden at the crucial moment in the selection process. The primary concern in this, is not the interests of Respondent that offers benefits or prosecution, but of the persons in charge of the selection, and the views espoused by these persons in charge who could be prejudice or bias against blacks, or could be induce to racial prejudice, or be encourage to perform racially prejudice actions upon the Petitioners, this would not assure the Petitioners equal protection under the law, rights, privileges and immunities, which are guaranteed and secured under the Fourteenth Amendment of the United States Constitution.

The decisions of the U.S. Supreme Court in *Anderson supra,* make clear that:

> "But by placing a racial label on the candidate at the most crucial stage in the electoral process– the State furnishes a vehicle by which racial prejudice may be so aroused

as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important--perhaps paramount-- consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines".

The District Court should identify and evaluate the precise interests put forward by the Respondent as justification for the burden imposed upon the Petitioners by the Respondent's policy, and the legitimacy and strength of each interest, and to consider the extent to which these interests make it necessary to burden the Petitioners rights. Respondent asserts that it has a strong compelling interest in minimizing fraudulent checks. On the record before the Court, shows Respondent writing race on checks policy has not shown to bear a demonstrable relationship to successful performance of the purpose of combating fraudulent customers' checks. Respondent alleged policy purpose was adopted by the District Court without meaningful study of the successful relationship to combating fraudulent customer checks ability. Respondent did not argue, or show any evidence that the alleged policy did actually combat fraudulent customers check, Respondent only assertion is, the alleged policy is to combat fraudulent customers' checks. Apparently, the District Court conclusion was instituted on Respondent statement that the alleged policy combated customers fraudulent checks. Carolyn Shelton, head of the accounting department testimony (R1-81-43-lines 19-Pg. 45-lines 8.) however, shows that Respondent did not even know whether the policy was successful or not, *Griggs v.*

Duke Power Co., 401 U.S. at 431, 91 S. Ct. at 853, 28 L. Ed. At 164, held that, if an employment practice which operates to excludes Negroes can not shown to be related to job performance, the practice is prohibited." also, once a discriminatory impact is shown, the Respondent carries the burden of proving that the challenged practice " bears a demonstrable relationship to successful performance of the jobs for which it was used. Respondent did not carry the burden of proving that writing race on the Petitioner's check bears a demonstrable relationship to successful combating of fraudulent checks.

The District Court did not weigh all the factors, and decide whether the challenged policy of the Respondent is unconstitutional. Respondent's policy of writing race or color on checks whether black or white violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, because it places unequal burdens on the Petitioners, and is designed to racially discriminate on blacks, not whites at the selection process, whether it is for some benefit or burden (R1-84, Nancy Silvia's affidavit supra).

The Respondent's alleged policy impairing the fundamental rights of the Petitioners, must survive the "strict scrutiny test" and must narrowly tailored to promote a compelling or overriding state interest to be able to stand.

The right of the Petitioners to be free from racial discrimination, and racial segregation is greater. This Court has sustained the right of the American Negroes to be free from racial discrimination, and racial segregation, and the application of the Fourteenth Amendment of the United States Constitution for citizens of all races rests on the premise that, it is prohibited to use race or color as a distinction.

While the right of the Respondent to combat check fraud is important, the interests of the Petitioners to be free from racial discrimination, and racial segregation which have caused emotional distress and other related injuries upon the Petitioners are neither abstract nor unimportant.

Initially the Petitioners pointed out the analyses of the District Court below were seriously deficient. The decision below apparently rest upon the erroneous premise that Respondent's conduct was not discriminatory because they were writing race on all customer checks. As the U.S. Supreme Court said in *Anderson v. Martin*, supra, that: " The State contends that its Act is nondiscriminatory because the labeling provision applies equally to Negro and white... we view the alleged equality as superficial." Also, in *Hunter v. Erickson*, 1969, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616, the Supreme Court explained:

> " Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson v. Martin*, 375 U.S. 399, 84 S. Ct. 454, 11 L.Ed. 2d 430 (1964), § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others." 393 U.S. at 391, 89 S. Ct. At 560.

The justification asserted by the Respondent that the Petitioner's race is for identification purpose is questionable, the Respondent has shown no valid

compelling state interest necessitating its action which would justify the burden placed upon the Petitioners in writing race on their check. In *Williams v. Matthews Company* 499 F. 2d 819, 826 (1974), it is stated that:

> " In order to rely upon a "Business necessity " justification for a business policy which, though fair in form, is discriminatory in operation, a Respondent must demonstrate the absence of any acceptable alternative that will accomplish the same business goal with less discrimination". See also, *Wallace v. Debron Corp.*, 494 F. 2d. 674 (8th Cir. filed Mar. 28, 1974).

The record shows Respondent had the Petitioner's drivers license and other points, yet chose to bear on the Petitioner's race for identification purpose. Furthermore, Respondent executives deposition testimonies also shows that writing race on customers' checks was not necessary. David Dickerson's deposition testimony stated that:

"Q. .... is it easier or harder to collect on a returned check based on color?...

A. In collecting a legitimate check, it doesn't make any difference. (R1- 83-123,-lines 16- Pg. 124-line 13.), and also, Carolyn Shelton testimony which stated:

"Q. Does it make your job any easier because you see the different races on the check?

A. It doesn't make it easier. It doesn't make it harder, because I am not looking at that."(R1-81-61-line 23, Pg. 62- line 1). In *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d. 110 (1960), the Supreme Court held that a law altering a town's boundaries constituted racial discriminatory on its face so that no racially discriminatory purpose inquiry had to be undertaken in the case, there was no need for

evidence of the background of racial discrimination in this political unit because there could be no reason for the odd reshaping of the town except for racial discrimination. Here it clearly shows that, the race was not necessary, and that race is the factor that have influenced the choice of the Respondent to write race on the Petitioners' check violating the Fourteenth Amendment of the United States Constitution Equal Protection Clause, and Title 42 § 1983.

The Supreme Court has recognized that discriminatory purpose can be shown by proof that the discriminatory impact is reasonably foreseeable consequence of the challenged action. See *Columbus Board of Education v. Penick*, 443, U.S. 449, 464-65, 99 S. Ct. 2941, 2950, 61 L.Ed. 2d. 666 (1979), See also *United States v. Texas Education Agency*, 564 F.2d 162, 168 (5th Cir 1977) cert. Den., 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed. 2d 879 (1979), see also *Dowdell v. City of Apopka*, 698 F. 2d 1181 (11th. Cir. 1983). Also, the Eleventh Circuit recognized, *Ammons v. Dade City*, 783 F.2d at 988, that; "When it is foreseeable, that the alleged act will lead to the "foreseeable outcome... then a discriminatory purpose as found by the District Court is properly shown." The record shows that, the "ultimate effect" of writing the race of the Petitioner on the Petitioners' check, was racially discriminatory, and the impact was foreseeable (R1- 81, Pg. 60, line 1-21).

The United States Supreme Court has never hesitated to condemn "neutral" laws that had an unacceptably adverse impact upon such (fundamental) rights as free speech, freedom of religion and freedom from racial discrimination. In *City of Mobile, Ala v. Bolden*, 446 at 120-21, 100 S.Ct. 1440 at 1517 (1980), the Court observed that the District Courts "finding that the legislature was acutely conscious of racial

consequences of its districting policies," constituted "direct evidence of the intent behind the maintenance of the at-large plan." The record shows Respondent was acutely conscious of the racial consequence of writing race on the Petitioners check (R1-81-58-line 14- Pg. 60-line 20), coupled with the overt aid from the state attorney's office in the writing of race on the Petitioner's check, with evidence that Respondent was not writing race on white people checks (R1- Nancy Silvia affidavit supra.), also, Margaret Haughton's deposition (R1-61-32-line 2-15) which has created adverse differential treatment.

In *Village of Arlington Heights v. Metropolitan Housing Dev., Corp.*, 429 U.S. at 265-66, 97 S. Ct. At 564, it is stated that: " The historical background of the decision is one evidentiary source..." The record shows that, Respondent departed from the normal procedural sequence of acceptance of customers checks, and the adherence to the writing of race on check policy with full knowledge of the predicable effects of violating the Petitioners Constitutional rights. (R1-81-58-line 14- Pg. 60-line 20.) Also, *Roberts v. Wal-Mart Stores Inc., 769 F. Supp.* 1086 (E.D. Mo. 1991), shows clearly the history, the foreseeability, and knowledge of the Respondent that the alleged policy would hurt black customers. Furthermore, Respondent did not apologize, was unresponsive to the Petitioners letter of complaint, and was insensitive to the Petitioners needs to resolve the situation forcing the Petitioners to take legal action. See co-manager William Clark deposition (R1-72-93-line 11- Pg. 95-2.), also, (R1-81-65-line 14- Pg. 66-line 13.) and also Respondent's assistant manager Michael Murphy deposition testimony about, " it is dumb" for the Petitioner to sue for racial discrimination and that "we are what we are." (R1-71-43-line 18- Pg. 48-line 7.) In *Roger v. Lodge* at 102 S. Ct. 3272, at 3280

(1982), where it was found that unresponsiveness of public body in question to group claiming injury is important element which could be consider in determining discriminatory purpose.

The Petitioners believe that, even though intent could be irrelevant in this case, the evidence in the record shows "direct evidence" of intent and purposeful racial discrimination by the Respondent, which may invoke the strictest scrutiny test.

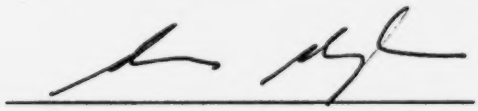
The Petitioners should not be denied freedom from racial discrimination under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, solely because of the color of their skin. Such denial would operate impermissibly to qualify the guarantee implicit in the Constitution that no state shall... deny to any person within its jurisdiction the Equal Protection of the Law.

Any classification which serves to penalize the exercise of freedom from racial discrimination, the compelling state interest should be triggered. Freedom from racial discrimination is a fundamental right to the very existence and survival of the Petitioners' race. Writing race on the Petitioners' check, and not on white people checks is a clear, pointed unmistakable discrimination. Respondent check writing policy was intentional racial discrimination, was racially prejudiced in its effect, in its purpose, and even in its avowed justification.

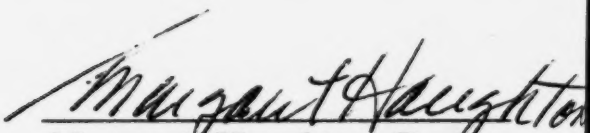
CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,



Ralston Haughton Pro se.



Margaret Haughton Pro se.

2150 Princeton St.,
Sarasota, Fla. 34237,
Tel: 941-724-2912

Dated: October 21, 2002.

APPENDIX

A. JUDGEMENT OF COURT OF APPEALS

United States Court of Appeals

For the Eleventh Circuit

No. 02-10385

District Court Docket No.
01-01131-CV-T-23

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jul 19, 2002
THOMAS K. KAHN
CLERK

RALSTON HAUGHTON, husband,
MARGARET HAUGHTON, wife,
Plaintiffs-Appellants,

versus

WAL-MART STORES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: July 19, 2002
For the Court: Thomas K. Kahn, Clerk
By: Meoli, Anthony

ISSUE AS MANDATE
OCT 02 2002
U.S. COURT OF APPEALS ATLANTA, GA.

B. OPINIONS BELOW

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10385
Non-Argument Calendar

D. C. Docket No. 0 1-0 1 13 1 -CV-T-23

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
July 19 2002
THOMAS K. KAHN
CLERK

RALSTON HAUGHTON, husband,
MARGARET HAUGHTON, wife,

Plaintiffs-Appellants,

versus

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(July 19, 2002)

Before ANDERSON, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Appellants Ralston and Margaret Haughton appeal the district court's entry

of summary judgment in favor of defendant Wal-Mart Stores, Inc. ("Wal-Mart") in their civil rights action brought pursuant to 42 U.S.C. § 1983.[1] At issue is Wal-Mart's policy of writing customers' sex and race on the face of their checks. The Haughtons contend that Wal-Mart's policy constitutes discrimination, alleging that Wal-Mart did not note white customers' race and sex on the checks they presented. The district court determined that the Haughtons failed to present affirmative-native credible evidence to rebut Wal-Mart's assertion that its policy was to document each customer's race and sex,, regardless of their ethnicity. Accordingly, there was no "genuine issue of material fact" and the district court granted summary judgment. The district court also found the state action element of a § 1983 claim lacking.

We review the district court's summary judgment de novo.

In order to prevail in an action brought under 42 U.S.C. § 1983, the plaintiffs must show that Wal-Mart acted under color of state law, and that it acted with discriminatory intent. The appellants argue that state action is present because Wal-Mart instituted its policy at the direction of the state attorney's office. Whether an entity is a state actor for the purposes of § 1983 is a mixed question of law and fact that we review de novo. Duke v. Smith,

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[1]Although the plaintiffs proceeded pro se, they were clear in their complaint that they brought action under "42 U.S.C. ° 1983, for civil rights violations committed by Defendant.' under color of state law". Complaint, Paragraph 1. Thus we need not consider whether the allegations could have withstood summary judgment under any competing theories. See Roberts v. Wal-Mart Stores, Inc., 769 F. Supp. 1086 (E.D. Mo. 1991) (rejecting similar allegations brought under °° 1981 and 1982).

3 F.3d 3883 392 (11th Cir. 1994).

There are three primary tests for state action: the public function test, the state compulsion test, and the nexus/joint action test. NBC v. Communications Workers of Am., AFL-CIO, 860 F.2d 1022, 1026 (11th Cir. 988). The public function test would be met if Wal-Mart performed actions that were "traditionally the exclusive prerogative of the state". Id. The joint action or nexus test would be met if Wal-Mart and the state were so involved that they could be said to have a symbiotic relationship. See, e.g., Murray v. Wal-Mart, Inc., 874 F.2d 555 (8th Cir. 1989) (finding police practice of detaining shoplifters without independent investigation to constitute "joint action"). And lastly, the state compulsion test would be met if the attorney general compelled, coerced, or significantly encouraged the action which was alleged to violate the Constitution. Id.

After reviewing the record on appeal, it is clear that none of the three state action tests is met. Wal-Mart did not perform the state attorney's job in prosecuting check fraud, and the two entities were not "intertwined" in a symbiotic relationship. Finally, although the state attorney's office advised Wal-Mart of the information that it would like to have to prosecute check fraud, it did not compel or provide encouragement significant enough for Wal-Mart to have become a state actor under the state compulsion test.

Because summary judgment was properly granted on this issue alone, we need not reach the question of discriminatory intent.

The plaintiffs also argue that the district court erred in granting summary judgment before they had completed discovery. Appellants claim that the items which they were kept from obtaining include: two requests for admission, requests for production, two

interrogatories, an inspection, and an affidavit from the Wal-Mart president.

A district court is not required to await completion of discovery before ruling on summary judgment. Reflectone, Inc. v. Farrand Optical Co., Inc., 862 F.2d 841, 843 -44 (11th Cir. 1989) ("appellant's argument that it is per se improper to grant summary judgment without providing the opponent an opportunity to conduct discovery is without merit"). Under Federal Rule of Civil Procedure 56(f), plaintiffs could have moved the court to permit further discovery; it is up to the plaintiffs to call any outstanding discovery to the court's attention. Id. at 844. The plaintiffs did not so move the court, and have not been able to show that any evidence that would have been obtained would have presented a genuine issue of material fact.[2]

Because the plaintiffs did not request that the district court await further discovery, pursuant to Fed. R. Civ. P. 56(f), and could not create a genuine issue

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[2]Even at this juncture the plaintiffs cannot show how any of these documents would assist them in showing that Wal-Mart was a state actor. In plaintiffs' motion for reconsideration, they repeated the same arguments they have asserted on appeal: that given more time the plaintiffs' "would have present (sic] credible evidence and points to material inconsistencies in Wal-Mart's evidence to demonstrate that Wal-Mart implemented its check identification policy in a discriminatory manner". Doc. 103 at 4. Merely alleging after the district court has already granted summary judgment that evidence would have assisted the plaintiffs' case is insufficient. Nowhere in the opposition to summary judgment did the plaintiffs state that specific pieces of evidence were needed before the district court granted sununary judgment. "Courts cannot read minds, thus it is only proper that 'the party opposing the motion for summary judgment bears the burden of calling to the district court's attention any outstanding discovery."' Reflectone, 862 F.2d at 844. Although plaintiffs proceeded pro se, they made no mention of ongoing discovery in their motion in opposition; instead, they filed exhibits and attachments

of material fact as to the state action element, summary judgment was proper.
AFFIRMED.[3]

[3]Appellant's request for oral argument DENIED. Because we reject plaintiffs' § 1983 claim, we need not address the state law claims for mental anguish and loss of consortium.

C. ORDERS ON REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-10385-EE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 24 2002
THOMAS K. KAHN
CLERK

RALSTON HAUGHTON, husband,
MARGARET HAUGHTON, wife,

Plaintiffs-Appellants,

versus

WAL-MART STORES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: ANDERSON, BAKKETT and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Ralston and Margaret Haughton is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON
UNITED STATES CIRCUIT JUDGE

ORD-41

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RALSTON HAUGHTON and MARGARET HAUGHTON, husband and wife,

Pliantiffs,

v.

WAL-MART STORES, INC.
Defendant.
_____/

FILED JAN-9 PM 5:55
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA
Case No. 8:01-cv-1131-T-23TBM

0 R D E R

Before the Court are the plaintiffs' motions for reconsideration (Doc. 103) and rehearing (Doc. 104) of the Court's order dated December 31, 2001 (Doc. 99). Upon consideration, the motions for reconsideration (Doc. 103) and rehearing (Doc. 1 0 4) are DENIED.

ORDERED in Tampa, Florida, on January 9, 2002.

s/ STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

cc:
Counsel of Record
Pro Se Parties

D. DISTRICT COURT ORDER
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RALSTON HAUGHTON and MARGARET HAUGHTON, husband and wife,

Plaintiffs,

v

WAL-MART STORES, INC.,
Defendant.

FILED
01 DEC 31 AM 11:30
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Case No. 8:01-cv-1131-T-23TBM

O R D E R

On February 15, 2001, the plaintiffs, Ralston Haughton and Margaret Haughton, purchased an ink cartridge at Wal-Mart store number 2459 in Sarasota, Florida ("Wal-Mart"). Mrs. Haughton paid for the cartridge with a personal check, which Wal-Mart accepted. To verify her identity, Mrs. Haughton presented her Florida drivers license. The Wal-Mart cashier wrote Mrs.Haughton's drivers license number and date of birth on the top of the check. The cashier also wrote "B/F" on the top of the check. The parties agree that "B/F" means "black, female. " Haughtons' principal claim, pursuant to 42 U.S.C. § 1983 ("Section 1983"), alleges that the "B/F" notation on the check constitutes "racial discrimination and racial segregation" in violation of the Fourteenth Amendment of the Constitution, for which violation the Haughtons seek $100,000,000 in compensatory damages and

$100,000,000 in punitive damages.[4] Wal-Mart now moves for summary judgment Rules of Civil Procedure, (Doc. 84). (Doc. 57) under Rule 56(c), Federal and the Haughtons oppose the motion.

To maintain a Section 1983 action, a plaintiff must prove a deprivation of a constitutional right, privilege, or immunity committed under color of state law. Bannum, Inc. v City of Fort Lauderdale, 901 F. 2d 989, 996-97 (Ilth Cir. 1990).

With respect to the constitutional right at issue, the gravamen of the Haughtons' claim is unlawful racial discrimination, which requires proof that Wal-Mart discriminated intentionally on the basis of race. 429 U.S. 252, Arlington Heights v. Metro. Hous. Dev. Corp., 264-65 (1977); Washington v. Davis, 426 U.S. 229, 246-48 (1976); Koch v. Rugg, 221 F.3d 1283, 1297 (Ilth Cir. 2000). "Discrimination" means "unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion." BLACK's LAW DICTIONARY 467 (6th ed. 1990). Discrimination is "intentional" when consciously premised on race or racial stereotypes regardless of the presence or absence of invidious hostility or racial animus. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 2000). 1284 (Ilth Cir. 2000).

The parties agree that Wal-Mart sold the Haughtons the item they intended to purchase and accepted Mrs. Haughton's personal check without hesitation. The Haughtons allege, however, the cashier's notation of B/F" on the check constitutes discrimination

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[4]The Haughtons' amended complaint (Doc. 98) contains threecounts. Count one alleges racial discrimination in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. Counts two and three allege claims for emotional distress and loss of consortium, which claims are wholly dependent on and derivative of the racial discrimination claim alleged in count one.

because Wal-Mart cashiers did not make an analogous notation of race and sex on checks presented by white customers. In support of its motion, Wal-Mart presents credible, consistent evidence that Wal-Mart store number 2459 maintained a policy requiring its cashiers to note identifying information (e.g., drivers license number, date of birth, and sex) of each customer presenting a personal check to purchase merchandise, regardless of the customer's race. Wal-Mart implemented the policy in order to combat check fraud.

The Haughtons fail to present any affirmative, credible evidence to rebut Wal-Mart's position or to establish a material factual dispute. See Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 257 (1986). Specifically, the Haughtons fail to present any credible evidence or point to any material inconsistencies in Wal-Mart's evidence to demonstrate that Wal-Mart implements its check identification policy in a discriminatory manner.[5] The evidence shows the opposite--that Wal-Mart employs the check identification policy without regard to race (or any other distinguishing characteristic, suspect or otherwise). In short, the Haughtons fail to present any credible evidence that Wal-Mart discriminated against them, intentionally or otherwise, on the basis of race.

Because no genuine material,,issue of fact exists with respect to whether Wal-Mart intentionally

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[5] The Haughtons' reliance on the affidavit of Nancy Silvia is unavailing. Ms. Silvia's single-sentence affidavit, which states that she is white and has presented checks at Wal-Mart on which a cashier did not note her race and sex, so lacks temporal and geographic specificity that it carries no persuasive force and fails to establish any issue of fact material to the disposition of this action.

discriminated against the Haughtons, the Haughtons' Section 1983 claim, and the Haughtons' remaining derivative claims, must fail.[6] Accordingly, Wal-Mart's motion for summary judgment (Doc. 57) is GRANTED. The Clerk is directed to (1) enter a judgment in favor of the defendant and against the plaintiffs, (2) terminate any pending motions, and (3) close the file.

ORDERED in Tampa, Florida, on December 31th, 2001.

s/ STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge
Courtroom Deputy
Counsel of Record
Pro Se Parties

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[6] As discussed above, to prevail on their discrimination claim, the Haughtons would need to demonstrate not only intentional discrimination but also that Wal-Mart, a private corporation, acted under color of state law. The record evidence demonstrates neither that the constitutional deprivation claimed by the Haughtons "resulted from the exercise of a right or privilege having its source in state authority" nor that Wal-Mart "could be described in all fairness as a state actor[,]" both of which must be present for a finding of action under color of state law. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (citations omitted).

E. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULE, AND REGULATIONS

CONSTITUTIONAL LAW, page 486, (Fifth Edition) by John E. Nowak, Ronald D. Rotunda, stated:

> "When state legislation commands a certain activity, or officially recognizes its legitimacy, there is no question but that state action is present whenever someone follows the guidelines of statute. In such a situation the challenged activity must be taken to exist because the state legislature has commanded its occurrence and continuation. For example, if a state legislature commands that restaurants serve food on a racially segregated basis it is clear that the action of restaurant owners who discriminate between their patrons on the basis of race will constitute state action. Also, see Peterson v. City of Greenville 83. S.Ct. 1119(1963)....

CONSTITUTIONAL LAW, page 486, (Fifth Edition) by John E. Nowak, Ronald D. Rotunda, that stated:

> " Similarly state legislation may encourage an activity so as to give rise to state action in the activities of private persons. For example, state action will be found in a restaurant' racially restrictive practices where state legislation requires that restaurants serving members of minority races have separate toilet facilities for those persons. (See Robinson v. Florida, 378 U.S. 153, 84 S.Ct. 1119, 10 L.Ed. 2d 323-22.) The restaurant owner who refuses to serve members of a minority is restricted by

constitutional provision because that decision must be held to be the result of the state legislation. To hold otherwise would allow the state to have helped establish or continue a practice without any effective remedy."

F. MISCELLANEOUS

AFFIDAVIT IN SUPPORT OF PEITIONERS'

WRIT FOR CERTIORARI

I, Ralston Haughton and Margaret Haughton in pro se, the Petitioners in this case duly sworn on oath, affirm that the statement we have made in the Writ for Certiorari are true to the best of our knowledge,information and belief.

State of Florida
County of Sarasota

Ralston Haughton

Margaret Haughton

SWORN TO AND SUBSCRIBED before me on 21, day of October 2002.

NOTARY PUBLIC

My Commission Expires:

OFFICIAL NOTARY SEAL
TERESA R FENNELLY
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC904560
MY COMMISSION EXP. JAN. 24,2004

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RALSTON HAUGHTON and MARGARET HAUGHTON,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

FILED
01 DEC 31 PM 1:39
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
Case No. 8:01-cv-1131-T-23TBM

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant and against the plaintiffs and this case is closed.

Date: December 31, 2001

SHERYL L. LOESCH, CLERK

By: s/ J. BOWERMAN, Deputy Clerk

No. 02-0670

Supreme Court, U.S.
FILED
NOV
CLERK

In The

Supreme Court of the United States

RALSTON HAUGHTON and
MARGARET HAUGHTON,

Petitioners,

v.

WAL-MART STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit properly affirmed the district court's judgment in favor of the respondent because the respondent's conduct did not involve the requisite "state action" necessary to maintain an action pursuant to 42 U.S.C. Section 1983.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Parties to Lawsuit

Margaret Haughton

Ralston Haughton

Wal-Mart Stores, Inc.

Other Interested Persons and Corporate Disclosure Statement

Hon. L. Lanier Anderson, Judge, U.S. Court of Appeals, Eleventh Circuit

Hon. Rosemary Barkett, Judge, U.S. Court of Appeals, Eleventh Circuit

Richard A. DuRose, Esq.

Foley & Lardner

Scott A. Forman, Esq.

John R. Hamilton, Esq.

Hon. Thomas B. McCoun III, U.S. Magistrate Judge, Middle District of Florida

Hon. Steven D. Merryday, U.S. District Judge, Middle District of Florida

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Wal-Mart de Mexico, S.A. de C.V.

Erin A. Webb, Atty. at Law

Hon. Charles R. Wilson, Judge, U.S. Court of Appeals, Eleventh Circuit

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF BASIS FOR JURISDICTION	1
STATEMENT OF THE CASE	2
ARGUMENTS FOR DENYING THE PETITION	4
A. WELL-SETTLED PRINCIPLES OF LAW AND THE EVIDENCE IN THE RECORD ESTABLISH THAT WAL-MART WAS NOT A STATE ACTOR	4
B. THE CASES CITED IN THE HAUGHTONS' PETITION DO NOT SUPPORT THEIR ARGUMENT THAT WAL-MART WAS ACTING UNDER COLOR OF STATE LAW	6
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

American Mfg'rs Mutual Insurance Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) 4, 6

Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982) 6

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961) 7, 8

Duke v. Smith, 13 F.3d 383 (11th Cir. 1994) 9

Edmondson v. Leesville Concrete Company, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) 8

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) 4, 6

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 85 S. Ct. 449, 42 L. Ed. 2d 477 (1974) 6

Lombard v. Louisiana, 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963) 7

Lugar v. Edmonson Oil Co., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) 8

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972) 6

Murray v. Wal-Mart, Inc., 874 F.2d 555 (8th Cir. 1989) 10

NBC v. Communications Workers of America, AFL-CIO, 860 F.2d 1022 (11th Cir. 1988) 10

TABLE OF AUTHORITIES – Continued

Page

Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982) 6, 11

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) 8

STATUTES

42 U.S.C. § 1983 ..... 1, 4, 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1446(b) 1

RULES

S. Ct. R. 10 9

S. Ct. R. 13.1 2

Fed. R. App. P. 4(a)(1)(A) 1

STATEMENT OF BASIS FOR JURISDICTION

The Haughtons' lawsuit was originally filed on May 18, 2001, in the Circuit Court of the Twelfth Judicial Circuit, in and for Sarasota County, Florida. They asserted, among other things, a claim under 42 U.S.C. Section 1983. Record 1:98. On June 13, 2001, Wal-Mart properly removed the action to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. Section 1446(b). Record 1:1.

The district court entered a final judgment in Wal-Mart's favor on December 31, 2001. Record 1:100. The Haughtons filed a motion for reconsideration on January 3, 2002, and a motion for rehearing on January 8, 2002. Record 1:103; 1:104. The district court entered an order denying those motions on January 9, 2002. Record 1:106. On January 16, 2002, the Haughtons filed a notice of appeal, seeking appellate review by the United States Court of Appeals for the Eleventh Circuit. The Haughtons invoked the jurisdiction of the court of appeals under 28 U.S.C. Section 1291, and their notice of appeal was timely under rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

The court of appeals affirmed the judgment in Wal-Mart's favor through an unpublished decision rendered on July 19, 2002. Petition for Writ of Certiorari at 26-30. The Haughtons timely filed a petition for rehearing on August 6, 2002, which the court of appeals denied by an order entered on September 24, 2002. On October 29, 2002, the Haughtons filed with this Court a petition for a writ of certiorari, invoking this Court's jurisdiction under 28

U.S.C. Section 1254(1). The petition was timely under rule 13.1 of the Supreme Court Rules.

STATEMENT OF THE CASE

On February 15, 2001, Ralston and Margaret Haughton, husband and wife, purchased merchandise from a Wal-Mart store in Sarasota, Florida. Record 1:98, ¶¶ 7-8. Ms. Haughton presented a personal check as payment for the merchandise. Record 1:98, ¶¶ 7-8. Wal-Mart accepted the check without hesitation,[1] but an employee wrote "B/F" on the check, signifying that Ms. Haughton is a black female. Record 1:98, ¶¶ 9-11. The employee also wrote Ms. Haughton's drivers license number and date of birth on the check. Record 1:98, Exh. A.

The notation on the check resulted from a store policy to record the race, sex, and other identifying information of those who presented checks for payment. Record 1:64:18. The policy was implemented as a consequence of contact that store representatives had initiated with the Florida State Attorney's Office, in which store representatives had sought advice regarding the information that the state attorney's office would need to prosecute those who presented worthless checks. Record 1:64:46-51.

Based upon guidelines suggested by the State Attorney's Office, the Wal-Mart store unilaterally implemented

[1] The Haughtons do not claim that Wal-Mart refused either to accept their check or to otherwise do business with them because of their race. They also claim no economic injury.

a policy mandating that all checks presented by customers be marked with certain information identifying the presenter, including the presenter's race. Record 1:63:62-63; 1:64:47. Contrary to what the Haughtons imply, the policy applies to every check, regardless of the race of the person presenting it. Record 1:63:50-51, 54; 1:65:34. The purpose of the policy's adoption was to help alleviate the store's problem with returned checks. Record 1:63:62-63; 1:64:47.

The Haughtons filed suit, alleging that the Wal-Mart employee's act of writing "B/F" on Ms. Haughton's check constituted a violation of 42 U.S.C. Section 1983 ("Section 1983"). Record 1:98, ¶¶ 14, 19, 27. The Haughtons also brought state-law claims for emotional distress and loss of consortium. Record 1:98, ¶¶ 22-31. The parties agree that the state-law claims are derivative of the Section 1983 claim. See Petition for Writ of Certiorari at 2.

The United States District Court for the Middle District of Florida entered a summary judgment in Wal-Mart's favor, concluding: (1) that the Haughtons were not subjected to unlawful discriminatory treatment; and (2) that the Haughtons had failed to show the requisite state action necessary to maintain a claim under Section 1983. Record 1:99. In an unpublished opinion, the United States Court of Appeals for the Eleventh Circuit affirmed solely on the latter ground, concluding that Wal-Mart did not act under color of state law. Petition for Writ of Certiorari at 26-30.

ARGUMENTS FOR DENYING THE PETITION

A. WELL-SETTLED PRINCIPLES OF LAW AND THE EVIDENCE IN THE RECORD ESTABLISH THAT WAL-MART WAS NOT A STATE ACTOR

To prevail on their claim under Section 1983, the Haughtons were required to establish at least two separate elements: (1) that that they were deprived of a right secured by the Constitution and the laws of the United States; and (2) that Wal-Mart deprived them of that right while acting under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56, 98 S. Ct. 1729, 1733, 56 L. Ed. 2d 185, 193 (1978). To prove the second element, it was necessary for the Haughtons to show that Wal-Mart was a state actor or that its actions were properly attributable to the state itself. *Id.*, 436 U.S. at 156, 98 S. Ct. at 1733, 56 L. Ed. 2d at 193; *see also American Mfg'rs Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130, 143-44 (1999). They wholly failed to make such a showing. Based on well-established principles of law, no state action was presented in this case as a matter of law, and no grounds exist for granting the Haughtons' petition.

The Haughtons' argument to the contrary is predicated upon their naked assertion that "[t]he record evidence established that Respondent's policy of writing the race of the Petitioner on the Petitioners' check was a result of compulsion by the state or a symbiotic relationship under the nexus test." Petition for Writ of Certiorari at 7. In truth, however, the record shows unequivocally that Wal-Mart was not rendered a state actor under either rationale: it was not compelled by the state to adopt its check-acceptance policy, and it has no "relationship" with the state attorney's office, symbiotic or otherwise.

The record unambiguously shows that the Sarasota Wal-Mart store's motivation for identifying a customer's race on his or her check was to aid the store in alleviating its problems with returned checks. The only involvement of the state in that process was that the store solicited the state attorney's advice as to the information to include on checks presented for payment. In that regard, the assistant store manager, Michael Murphy, testified: "I am merely trying to protect my company, my store, and myself from a thief or people that don't want to be honest and write bad checks. It goes no further than the store." Record 1:71:40.

Similarly, the store manager, David Dickerson, testified: "We put the race and gender of everyone on the back of the check for the purposes of assisting us in identification in the event that we have to pursue collection on a fraudulent check or returned check." Record 1:63:6. The head of the store's accounting department, Carolyn Shelton, testified: "I did it because that's what we needed in order to prosecute checks." Record 1:65:50.

The record is replete with evidence refuting the Haughtons' allegation that the Sarasota Wal-Mart store is somehow in collusion with the state attorney. On the contrary, there is absolutely no evidence to support such an allegation. Indeed, there is no evidence that would even permit a reasonable inference that the Sarasota Wal-Mart store would suffer any adverse consequences from the Sarasota state attorney if it did not identify its customers' names on their checks. Likewise, there is no evidence that the state attorney *directed* the store to write the race of its customers on their checks. It merely recommended that the store do so to aid the state attorney in identifying and prosecuting customers who write worthless checks.

Thus, absolutely no evidence of state "compulsion" exists here. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S. Ct. 2764, 2771, 73 L. Ed. 2d 418, 428 (1982). Moreover, a state's mere authorization of, acquiescence in, encouragement of, or approval of a private action does not "convert that action into that of the State." *Flagg Bros.*, 436 U.S. at 164, 98 S. Ct. at 1737, 56 L. Ed. 2d at 198; *see Sullivan*, 526 U.S. at 52, 119 S. Ct. at 986, 143 L. Ed. 2d at 145; *Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 2786, 73 L. Ed. 2d 534, 547 (1982).

Nor does such state authorization, acquiescence, or encouragement create a symbiotic relationship or close nexus between the state and the private actor. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173-75, 92 S. Ct. 1965, 1971-72, 32 L. Ed. 2d 627, 638 (1972); *see also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58, 85 S. Ct. 449, 457, 42 L. Ed. 2d 477, 488 (1974). Such a relationship exists only when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Sullivan*, 526 U.S. at 52, 119 S. Ct. at 986, 143 L. Ed. 2d at 145 (quoting *Blum*, 457 U.S. at 1004, 102 S. Ct. at 2786, 73 L. Ed. 2d at 546). Nothing of that nature exists here. Without question, state action is completely lacking.

B. THE CASES CITED IN THE HAUGHTONS' PETITION DO NOT SUPPORT THEIR ARGUMENT THAT WAL-MART WAS ACTING UNDER COLOR OF STATE LAW

The cases cited in the Haughtons' petition are not to the contrary. All are easily distinguishable from the facts presented here, and each one in fact illustrates the fatal

deficiencies in the Haughtons' position. A review of those cases merely serves to emphasize the vast differences between this case and the cases in which this Court has held that state action existed.

For example, in *Lombard v. Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963), the petitioners were convicted of violating the Louisiana criminal mischief statute because they refused to leave a store when requested to do so by the store manager. This Court held that state action was present because it appeared from public statements of city officials that they directed continuance of segregated service in restaurants and prohibited any conduct directed towards its discontinuance. The evidence thus tended to indicate that the store official's actions were coerced by the city. 373 U.S. at 273, 83 S. Ct. at 1125, 10 L. Ed. 2d at 342. In the Haughtons' case, in contrast, no such coercion is presented.

Likewise inapposite is *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). In that case the defendant, a private corporation, operated a restaurant in a space that it leased in an automobile parking building owned and operated by an agency created by the State of Delaware to provide parking facilities. The restaurant constituted an integral part of the state's plan to operate the building as a self-sustaining unit. 365 U.S. at 718-20, 81 S. Ct. at 858-59, 6 L. Ed. 2d at 48-49. The lessee refused to serve the plaintiff solely on the ground that he was black. 365 U.S. at 720, 81 S. Ct. at 859, 6 L. Ed. 2d at 49.

This Court found that the Equal Protection Clause of the Fourteenth Amendment was violated by the refusal of the lessee of a state agency to serve a person because of

his race. In view of all the circumstances of the case – including the fact that the restaurant was physically and financially an integral part of a public building, it was built and maintained with public funds, it was devoted to a public parking service, and it was owned and operated by an agency of the state for public purposes – the state was a joint participant in the operation of the restaurant. 365 U.S. at 723-25, 81 S. Ct. at 860-63, 6 L. Ed. 2d at 51-52.

Similar "joint participant" considerations came into play in *Edmondson v. Leesville Concrete Company*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988), and *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). In each case, this Court held that state action could occur when private actors make use of state procedures with overt, significant assistance and involvement of state officials. *Edmondson*, 500 U.S. 621-22, 111 S. Ct. at 2083-84, 114 L. Ed. 2d at 674 (peremptory challenges in civil action); *Pope*, 485 U.S. at 486, 108 S. Ct. at 1345, 99 L. Ed. 2d at 576 (nonclaim statute in probate proceedings); *Lugar*, 457 U.S. at 942, 102 S. Ct. at 2756, 73 L. Ed. 2d at 498 (attachment proceedings).

Such "joint participant" facts, however, are obviously not presented with respect to the so-called "relationship" between Wal-Mart and the state attorney's office in Sarasota. The two are not "joint participants" in anything remotely resembling the restaurant at issue in *Burton*. They are also not acting jointly in pursuance of a state procedure such as those at issue in *Edmondson*, *Pope*, and *Lugar*.

In the final analysis, the cases the Haughtons cite in their petition have virtually no relevance to the facts presented here.[2] They have cited no authority that would support a conclusion that Wal-Mart was engaging in state action when its employee wrote Ms. Haughton's race on her check. In fact, a conclusion to the contrary is mandated by the existing case law.

The treatment of this issue by the court of appeals was therefore correct. It shows neither a misapplication of the law nor the application of a rationale that is in conflict with either decisions of this Court or decisions of other courts of appeals:

> In order to prevail in an action brought under 42 U.S.C. § 1983, the plaintiffs must show that Wal-Mart acted under color of state law, and that it acted with discriminatory intent. The appellants argue that state action is present because Wal-Mart instituted its policy at the direction of the state attorney's office. Whether an entity is a state actor for the purposes of § 1983 is a mixed question of law and fact that we review de novo. *Duke v. Smith*, 13 F.3d 383, 392 (11th Cir. 1994).
>
> There are three primary tests for state action: the public function test, the state compulsion

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[2] The Haughtons misuse the term "conflict" in their argument. Petition for Writ of Certiorari at 7-15. The decision of the court of appeals is not in conflict with that of any other court. The Haughtons' actual argument is that the court of appeals did not agree that the cases they cited were applicable to the facts of this case. Certiorari is generally inappropriate in such instances. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

> test, and the nexus/joint action test. *NBC v. Communications Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988). The public function test would be met if Wal-Mart performed actions that were "traditionally the exclusive prerogative of the state." *Id.* The joint action or nexus test would be met if Wal-Mart and the state were so involved that they could be said to have a symbiotic relationship. *See, e.g., Murray v. Wal-Mart, Inc.*, 874 F.2d 555 (8th Cir. 1989) (finding police practice of detaining shoplifters without independent investigation to constitute "joint action"). And lastly, the state compulsion test would be met if the attorney general compelled, coerced, or significantly encouraged the action which was alleged to violate the Constitution. *Id.*
>
> After reviewing the record on appeal, it is clear that none of the three state action tests is met. Wal-Mart did not perform the state attorney's job in prosecuting check fraud, and the two entities were not "intertwined" in a symbiotic relationship. Finally, although the state attorney's office advised Wal-Mart of the information that it would like to have to prosecute check fraud, it did not compel or provide encouragement significant enough for Wal-Mart to have become a state actor under the state compulsion test.
>
> Because summary judgment was properly granted on this issue alone, we need not reach the question of discriminatory intent.

Petition for Writ of Certiorari at 27-28.

The reasoning of the court of appeals is unassailable, and it presents no basis for further review by this Court. The record established the absence of any disputed issue

of material fact on the question of whether Wal-Mart was acting under color of state law. Once it was established that the action of Wal-Mart was not state action, "the inquiry ends." *Rendell-Baker*, 457 U.S. at 838, 102 S. Ct. at 2770, 73 L. Ed. 2d at 426. The district court accordingly properly granted summary judgment in Wal-Mart's favor, and the court of appeals correctly affirmed that conclusion. Both courts applied well-settled principles of law to clearly-established facts. No further appellate review is warranted, and this Court should therefore deny the Haughtons' petition.

CONCLUSION

For the foregoing reasons, Wal-Mart respectfully requests that the Court deny the Haughtons' petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court U.S.
FILE
DEC 5 2002

No. 02-670

IN THE

SUPREME COURT OF THE UNITED STATES

RALSTON HAUGHTON and MARGARET HAUGHTON
husband and wife, Petitioners

vs.

WAL-MART STORES INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Title 42 U.S.C. § 1983, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, affords the Respondent Wal-Mart Stores Inc., the right to be directed, to be advised, and to be authorized by the states attorney's office to write the race of the Petitioner on the Petitioners' check when purchasing merchandise at the Respondent's store, and Respondent Wal-Mart Stores Inc., not be rendered a state actor "under color of state law".

2. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, affords Respondent Wal-Mart Store Inc., the right to write the race of the Petitioner on the Petitioners' check when purchasing merchandise at Wal-Mart Store Inc., store, without a valid compelling state interest.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1. ASDA Group Limited
2. Richard A. DuRose
3. Scott A. Forman, Esquire
4. Hon. Thomas B. McCoun, 111, U.S. Magistrate Judge
5. Margaret Haughton
6. Ralston Haughton
7. McLane Company, Inc., and its subsidiaries
8. Hon. Steven D. Merryday, U.S. District Judge
9. Sam's East,, Inc.
10. Sam's Property Company
11. Sam's West, Inc.
12. Sam's Real Estate Business Trust
13. Michael C. Scher, Esquire
14. Wal-Mart Property Company
15. Wal-Mart de Mexico, S.A. de C.V.
16. Wal-Mart Real Estate Business Trust
17. Wal-Mart Stores East, Inc. Page
18. Wal-Mart. Com, Inc.
19. Wares Delaware Corporation
20. Erin A. Webb
21. Hon. L. Lanier Anderson, Judge, U.S. Court of Appeals. Eleventh Circuit.
22. Hon. Rosemary Barkett, Judge, U.S. Court of Appeals Eleventh Circuit
23. Hon. Charles R. Wilson, Judge, U.S. Court of Appeals, Eleventh Circuit.
24. John R. Hamilton, Esq.

TABLE OF CONTENTS

Page

Question Presented for Review.....-i-
List of Parties to the Proceedings in this Court.....-ii-
Table of Authorities.....-iv-
Petitioners' Reply to Respondent's Argument A.....1
Petitioners' Reply to Respondent's Argument B.....3
Conclusion.....6
Miscellaneous.....7

TABLE OF AUTHORITIES CASES

Page

Anderson v. Martin, 375, U.S. 399, 84 S. Ct. 454, 11 L. Ed. 2d 430.....1

Barrows v. Jackson, 346 U.S. 249, 254, 73 S. Ct. 1031, 1033, 97 L. Ed. 1586.....1

Baldwin v. Morgan, 287 F.2d at 750-760, (5th Cir. 1961).....2

Burton v. Wilmington Parking Authority, 81 S. Ct. 856 (1961).....1,2,3,4

Edmonson v. Leesville Concrete Co., (1991) 500 U.S. 614, 114 L.Ed. 2d 660, 674, 111 S. Ct. 2077.....4

*Lombard v. Louisiana 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963).....*3

McCabe v. Atchison, Topeka & Santa Fe R. Co., 235 U.S. 151, 35 S. Ct. 69, 59 L. Ed. 169.....1

Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d. 830 (1967).....*1,2,3,5*

Robinson v. State of Florida, 378 U.S. 153, 156, 84 S. Ct. 1693, 1695, 12 L. Ed. 2d 771.....*1*

Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, at 596, (2th Cir. 1970).....5

STATUTES

42 U.S.C. § 1983.....-i-,1

Florida Statute § 832.....2,3

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution.....-i-,1,2,5

Equal Protection Clause of the Fourteenth Amendment.....-i-,1,2,5

PETITIONERS' REPLY TO RESPONDENT'S ARGUMENT A

WELL-SETTLED PRINCIPLES OF LAW AND THE EVIDENCE IN THE RECORD ESTABLISH THAT WAL-MART IS A STATE ACTOR

The Petitioners' petition for writ of certiorari page 8, cited *Reitman v. Mulkey,* 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d. 830 (1967). Here it is well stated that:

> "Based on these cases, *Robinson v. State of Florida,* 378 U.S. 153, 156, 84 S. Ct. 1693, 1695, 12 L. Ed. 2d 771; *Anderson v. Martin,* 375, U.S. 399, 84 S. Ct. 454, 11 L. Ed. 2d 430; *Barrows v. Jackson,* 346 U.S. 249, 254, 73 S. Ct. 1031, 1033, 97 L. Ed. 1586; *McCabe v. Atchison, Topeka & Santa Fe R. Co.,* 235 U.S. 151, 35 S. Ct. 69, 59 L. Ed. 169, it concluded that a prohibited state involvement could be found "even where the state can be charged with only encouraging," rather than commanding discrimination.
>
> Also of particular interest to the Court was the Honorable Mr. Justice Stewart's concurrence in *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 726, 81 S. Ct. 856, 862, 6 L.Ed. 2d 45, where it was said that the Delaware courts had construed an existing Delaware statute as "authorizing" racial discrimination in restaurants and that the statute was invalid."

These cases show conflicting results from the ruling of the lower Courts in this case.

In this case the state attorney's office had taken affirmative action designed to make Respondent discrimination possible. Respondent's customer check

policy was changed from one in which discrimination was restricted to one wherein it is encouraged and was made a guideline (R1- 81,- 47- lines 14-17). The state attorney's office advice, direction and authorization to Respondent to write the race of the Petitioner on the Petitioners' check made the state attorney's office a partner in the instant act of discrimination. See *Reitman v. Mulkey,* 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d. 830 (1967).

The record also shows that, race is the determinant factor throughout this case, and that the state attorney's office used race as a basis for distinction through the medium of Respondent (R1- 81,- 46-lines 21- Pg. 47-line 2), also (R1- 83,- 132,-lines 12-24), of which is clearly forbidden in this Court.

The Petitioners cited *Baldwin v. Morgan,* 287 F.2d at 750-760, (5th Cir. 1961), which held that:

> "What is forbidden is the state action in which color (i.e., race) is the determinant." Id 754. The Court then went on to say: "As we have pointed out above the State may not use race or color as the basis for distinction. It may not do so by direct action or through the medium of others who are under State compulsion to do so". Id 756.

The record has clearly shown that the Petitioners were deprived by the Respondent of their right to be free from racial discrimination, which is secured by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The record has also shown that, the Respondent was a state actor acting under color of state law by writing the race of the Petitioner on the Petitioners' check by the direction, the advice, and the authorization of the state attorney's office.

PETITIONERS' REPLY TO RESPONDENT'S ARGUMENT B.

THE CASES CITED IN THE HAUGHTON'S PETITION DOES SUPPORT THEIR ARGUMENT THAT WAL-MART WAS ACTING UNDER COLOR OF STATE LAW

The Petitioners in their petition for writ of certiorari cited *Lombard v. State of Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338. Here, this Court in *Reitman v. Mulkey*, 387 U.S. 369, at 380 87 S. Ct. 1627, at 1633, 18 L. Ed. 2d. 830 (1967), quoting Lombard supra, stated:

> "Finally, in Lombard v. State of Louisiana 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338, the Court interpreted public statements by New Orleans City Officials as announcing that the city would not permit Negroes to seek desegregated service in restaurants because the statements were deemed to have as much coercive potential..."

Similarly in this case, the statement of the state attorney's office that they would prosecute Respondent's customers' fraudulent checks with race written on them, using the Court and the Florida Statute 832, was potentially coercive for Respondent to adopt and follow the state attorney's direction, guidelines and authorization to write the race of the Petitioner on the Petitioners' check violating the Petitioners' Constitutional rights. Respondent's head of the accounting department Carolyn Shelton testified that: "... *if we wanted to prosecute checks, we had to follow these guidelines in order to do it.* (R1- 81,- 47- lines 14-17), also, (*R1-83-132,- lines 12-24*).

This Court also stated in *Reitman v. Mulkey* 387 U.S. 369, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d. 830 (1967) that:

"In *Burton v. Wilmington Parking Authority*,

> 365 U.S. 715, 81 S. Ct. 856, the operator-lessee of a restaurant located in a building owned by the State and otherwise operated for public purposes, refused service to Negroes. Although the State neither commanded nor expressly authorized or encouraged the discrimination, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction * * * has * * * made itself a party to the refusal of service * * * "which therefore could not be considered the purely private choice of the restaurant operator."

The Petitioners cited Burton Id., showing similarity in this case that the state attorney's office is responsible for the Respondent's alleged conduct, and not only did the state attorney's office authorize, direct, or advise the alleged conduct of the Respondent, the state attorney's office also enforces the racially discriminatory conduct of the Respondent upon the Petitioners. Respondent's head of the accounting department Carolyn Shelton testified that: *"When we went to prosecute on the check, the prosecutor told us we had to have this information in order to prosecute* (R1- 81,- 46 lines 21- Pg. 47- line 7), in that, the state attorney's office not only has made itself a party to the racial discriminatory act, but also has elected to place the state attorney's office power, property, the Court, and prestige behind the alleged discriminatory conduct. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, also see *Edmonson v. Leesville Concrete Co.*, (1991) 500 U.S. 614, 114 L.Ed. 2d 660, 674, 111 S. Ct. 2077.

The Respondent cited the United States Court of Appeals Eleventh Circuit ruling(Appx-B-Pg. 28.), which

stated that:

> " Finally, although the state attorney's office advised Wal-Mart of the information that it would like to have to prosecute check fraud, it did not compel or provide encouragement significant enough for Wal-Mart to have become a state actor under the state compulsion test."

The Petitioners cited *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, at 598, (2nd Cir. 1970), which stated that:

> "if the state engages in conduct having the effect of encouraging, tolerating or acquiescing in discrimination, the Fourteenth Amendment may be invoked. (quoting) *Reitman v. Mulkey*, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d. 830 (1967)," showing more conflicting results.

The evidence in the record has shown that the state attorney's office did tolerate the writing of race on customers checks (R1- 81,- 47- lines 14-17)., the state attorney's office authorized the writing of race on customers' checks allowing the alleged policy of the Respondent to violate the Petitioners' Equal Protection right under the Fourteenth Amendment of Constitution of the United States (R1- 98, *copy of check attached*), and also, the state attorney's office acquiescing in the discrimination (R1- 83,- 131,- lines 11- Pg 132- line 24).

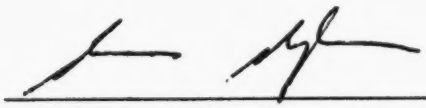
Furthermore, the record shows that Respondent has not shown any demonstration of any successful relationship to combating customers' fraudulent checks.

The facts and the evidence in the record has clearly shown that the lower Courts have reached conflicting results in this case, and have overlooked a clear distinction that this Court's cases have drawn, and the Court should therefore grant the Petitioners' petition for writ of certiorari.

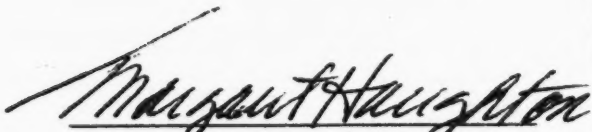
CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,



Ralston Haughton Pro se.



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Dated: December 4, 2002.

MISCELLANEOUS

AFFIDAVIT IN SUPPORT OF PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I, Ralston Haughton and Margaret Haughton in pro se, the Petitioners in this case duly sworn on oath, affirm that the statement we have made in the Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari are true to the best of our knowledge, information and belief.

State of Florida
County of Sarasota

Ralston Haughton

Margaret Haughton

SWORN TO AND SUBSCRIBED before me on 5th, day of December 2002.

NOTARY PUBLIC

My Commission Expires: